

Resolution No.	<u>15-276</u>
Introduced:	<u>June 10, 2003</u>
Adopted:	<u>July 22, 2003</u>

**COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND**

By: Council President

SUBJECT: Approval of a Cable Franchise Settlement Agreement with Starpower Communications, LLC

Background

1. In August 1999, the County granted Starpower Communications, LLC a cable franchise in which the company agreed to construct an "Initial Franchise Area" by September 2, 2003 and an "Extended Franchise Area" by September 2005.
2. Starpower Communications, LLC will not meet its 2003 build-out requirement because the economic collapse of the telecommunications sector has limited the amount of financing available to over-build cable operators. In anticipation of the default, the Executive and Starpower negotiated a modification to the Franchise Agreement by reducing Starpower Communications, LLC's Franchise Area to its current build-out area.
3. On April 16, 2003 the Council received the Executive's recommendation to execute a Settlement Agreement with Starpower Communications, LLC.
4. Montgomery County Code Section 8A-8 requires that the County consent to a modification of a Franchise Agreement. In accordance with Section 8A-29(c)(5), any modification of a franchise in a manner that substantially alters material provisions of a Franchise Agreement requires Council approval, after receiving a recommendation from the Executive.
5. Montgomery County Code Section 8A-29(d) provides that a franchise application is approved automatically if the Council does not act on the Executive's recommendation within 60 days after the Council receives the recommendation, not including any week when the Council does not meet in regular session. The Council by resolution may extend the deadline for action. On June 10, 2003, the Council approved resolution 15-200, which extended the deadline for action on the modification to the Franchise Agreement with Starpower Communications, LLC to July 29, 2003.
6. The Management and Fiscal Policy Committee held a public hearing on the proposed Settlement Agreement on July 1, 2003 and held a worksession on July 7, 2003. The Committee recommends that the Council approve the modification of the Franchise

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT is made this ____ day of _____, 2003, by and between:

1. Montgomery County, Maryland, a charter county organized under Maryland law ("County"); and
2. Starpower Communications, L.L.C. ("Starpower"), a Delaware limited liability company.

WITNESSETH:

WHEREAS, the County granted Starpower a franchise to construct and operate a cable television system in the County (the "Franchise"); and

WHEREAS, the terms of this Franchise are specified in the Cable Franchise Agreement between Montgomery County and Starpower Communications, L.L.C., approved August 3, 1999, and is subject to Montgomery County Code 1994, as amended, Chapter 8A, ("County Cable Law"); and

WHEREAS, Starpower has begun construction of the System, which, according to Starpower passes approximately 50,000 County homes and has over 5,000 County subscribers; and

WHEREAS, the Franchise requires construction of the "Initial Franchise Area" to be completed by September 2, 2003, (the "Build-Out Date"); and

WHEREAS, Starpower has represented to the County that it will not be able to comply with the requirements of the Franchise to complete construction of the System by the Build-Out Date; and

WHEREAS, Starpower's anticipated failure to complete the Franchise build-out as required raises potential claims under the franchise; and

WHEREAS, the parties have agreed to the terms of this Settlement Agreement to avoid a dispute over the obligations and damages arising from any potential claims;

NOW, THEREFORE, in consideration of the promises and undertakings herein, and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, THE PARTIES DO HEREBY AGREE AS FOLLOWS:

SECTION 1. SETTLEMENT TERMS

1.1 The Parties agree to redefine Starpower's franchise area in the County. Accordingly, Section 2(b) of the Franchise Agreement shall be amended to read as follows:

(b) *Area Served:*

(1) The Franchise is granted for the Franchise Area defined in amended Exhibit B. ~~(the "Initial Franchise Area"), and additional portions of the County described in Exhibit B that will be added during the Franchise term pursuant to this section (the "Extended Franchise Area"). Within one hundred eighty (180) days following the Effective Date, Starpower shall submit a revised Exhibit B which, based upon the completion of field engineering surveys, expands the Initial Franchise Area and the Extended Franchise Area such that the outer boundary of the combined Initial Franchise Area and Extended Franchise Area encompass all contiguous areas with an average density of one hundred (100) homes per mile or more. This Franchise is also granted for such other portions of the County that may in the future be added to the Initial Franchise Area and the Extended Franchise Area pursuant to Section 2(c) (the "Additional Franchise Areas"). The Initial Franchise Area, the Extended Franchise Area, and any Additional Franchise Areas shall jointly comprise the entire Franchise Area under this Agreement. If the Operator wishes to add additional portions of the County to the Franchise Area that are not Additional Franchise Areas, it shall apply for an additional franchise, pursuant to the provisions of the Cable Law.~~

(2) ~~At any time during the period permitted for the Operator's build-out of the Initial Franchise Area, but in no event later than four (4) years following the Effective Date, the Operator shall submit a notice of intent to expand its System into the Extended Franchise Area. The notice shall include the operator's planned construction schedule. Such notice shall be submitted at least thirty (30) days in advance of any construction in the Extended Franchise Area. All of the terms of this Agreement and Chapter 8A of the County~~

Code shall apply to the construction, operation and maintenance of the Operator's System throughout the Franchise Area, ~~including both the Initial Franchise Area and the Extended Franchise Area.~~

Section 2(c) of the Franchise Agreement, *Additional Franchise Areas*, shall be struck in its entirety.

Section 2(m) of the Franchise Agreement shall be amended to read as follows:

(m) *Promotion of Competition*: The County is committed to promoting competition in cable television service for all residents, wherever they choose to reside in the County. ~~The expansion of Starpower service countywide, to areas outside the Initial and Extended Franchise Areas, is a major County goal. The County encourages Starpower submit an application to expand its franchise area when feasible and to seek a modification of this Franchise. If and when Starpower submits an application for a larger franchise area, the County will consider appropriate terms and conditions for the grant of any expansion of Starpower's franchise area.~~

The following excerpted portion of Section 4(b) of the Franchise Agreement shall be amended to read as follows:

(b) *Line Extension Requirements*

(1) Requirements. After final acceptance of initial construction of the System in the Initial Franchise Area pursuant to Section 6(i), the Operator shall extend its Cable System within a reasonable time (but not to exceed ninety (90) days) to provide service to any person or business in the Franchise Area upon request at no charge other than any applicable installation fees for the individual subscriber's drop, as long as the following conditions are satisfied:

* * *

~~(3) — Construction of System in Extended Franchise Area. After final acceptance by the County of initial construction of the Operator's System in the Extended Franchise Area or any Additional Franchise Area, the provisions of Sections 4(b)(1) and 4(b)(2) shall apply to the entire Franchise Area.~~

The following excerpted portion of Section 6(b) of the Franchise Agreement shall be amended to read as follows:

(b) *System Construction in Initial Franchise Area*. Within four years after the effective date of this Agreement, the Operator shall complete construction of a System in the Initial Franchise Area providing at least the following capabilities (the "System Build-Out"):

Section 6(c) of the Franchise Agreement, *System Construction in Extended Franchise Area*, shall be struck in its entirety.

The following excerpted portion of Section 6(d) shall be amended to read as follows:

(d) *System Architectural Design Review Process:*

At least ninety (90) days prior to the date of initial construction in each of the Initial Franchise Area and the Extended Franchise Area, the Operator shall deliver to the County a detailed architectural design plan, which shall include at least the following elements:

Section 6(e) of the Franchise Agreement shall be amended to read as follows:

(e) *System Physical Design Review Process.* The Operator shall provide the County with detailed design maps defining the geographical and technical physical design of the System in both the Initial Franchise Area and the Extended Franchise Area and showing the areas of the County to be served by each hub, as well as the construction and energization schedule by hub area for the upgraded systems. Maps shall be provided at least 45 days prior to release for construction. The County may review the physical system design maps and submit comments to the Operator within fifteen (15) days of the date each map is provided to the County for review. The Operator shall take any such comments into account in implementing its construction plan.

Section 6(f) of the Franchise Agreement shall be amended to read as follows:

(f) *Construction Manual.* No later than sixty (60) days before the date construction of the System in the Initial Franchise Area is to begin, the Operator shall provide for County review and approval, a System construction manual, installation manual, and plan for notifying area residents of the System Construction work process. Updated versions of these manuals and plans shall be submitted no later than sixty (60) days before construction in the Extended Franchise Area is to begin.

Section 6(h)(1) of the Franchise Agreement shall be amended to read as follows:

(1) The Operator shall begin construction of the System within six months of the effective date of the Agreement, and shall complete construction in the Initial Franchise Area within four years of the effective date of the Agreement, in order to minimize disruption

of the Public Rights-of-Way. The Operator's construction plan shall insure that service is extended to low income areas at least as quickly as it is extended to higher income areas.

Section 14(a)(4) of the Franchise Agreement shall be amended to

read as follows:

(4) Reduction of Bond. Ninety (90) days after acceptance by the County of construction of the System in both the Initial Franchise Area and the Extended Franchise Area, the Operator may submit to the County a written request to reduce the amount of the performance bond. The County shall then authorize the Operator, in writing, to reduce the amount of the performance bond to \$250,000, provided that all outstanding claims of the County or an affected Participating Municipality against the Operator have been resolved to the County's satisfaction.

Exhibit B of the Franchise Agreement shall be amended to include only

those areas outlined in amended Exhibit B, attached hereto.

1.2 In consideration of the County's agreement to amend the boundaries of the Starpower Franchise Area, Starpower will provide to the County up to three T-3 circuits commencing upon the execution of this agreement at the locations within the County that the County requests. Section 7(b)(3) of the Franchise Agreement shall be amended as follows:

(3) The Operator shall without charge provide Internet services, including Internet Protocol ("IP") addresses, to County administrative departments and agencies. Upon the execution of this agreement, the Operator, within 90 days following the effective date of this Agreement, shall install without charge up to two (2) activated T-1 two T-3 circuits or equivalent connections at a County-designated location to enable County access to such Internet services (the "Internet Connections"). For purposes of this paragraph, "T-3 circuit" means digital transmission facilities with a total signaling speed of 44.726 Mbps (44,726,000 bits per second). Internet usage shall be metered, and reports shall be provided to the County at least once a month. Upon the County's request, the Operator shall install without charge an additional T-3 circuit. In the event that the average throughput between 7:00 a.m. and 7:00 p.m. over a one-week period exceeds 25% of capacity or there are five or more instances in a single week in which throughput reaches full capacity, the Operator shall without charge install additional activated Internet Connections within ninety (90) days for Internet Connections obtained by the Operator from another provider, and within ten (10) days for Internet Connections provided over the Operator's facilities, up to a maximum of four (4) such Internet Connections. The Operator shall provide IP addresses for the County for this

service as requested by the County. In addition, the Operator shall provide the Participating Municipalities, at no charge, with Internet services, Web hosting services, Web development services, and the related facilities described in Exhibit F. Exhibit F may be amended at any time until ninety (90) days after the Effective Date, to reflect the addition of requests from municipalities not currently listed for Internet services, to request up to ten (10) high-speed cable modems per municipality, and to reflect mutually agreed upon changes in the requirements currently specified. Internet Access service to any location requested by a Participating Municipality shall be available only on a dial-up basis until such time as high-speed service over the Operator's facilities is available to residential subscribers neighboring the requested municipal location.

(A) To the extent that the County may require more than ~~four (4)~~ three (3) such T-3 Internet Connections and related Internet service, at the request of the County the Operator will provide to the County additional Internet connections and services at rates to be mutually agreed upon by the Operator and the County, not to exceed the Operator's standard rates for such connections and usage of its Internet services. The Operator shall provide IP addresses to the County for this service as requested by the County.

(B) The Operator shall provide as many IP addresses to the County as may be served via a maximum of ~~four (4)~~ three (3) T-3 Internet Connections without unreasonably degrading the service. To the extent that the County may subscribe to more than ~~four (4)~~ three (3) T-3 Internet Connections from the Operator, at the request of the County the Operator will provide to the County additional IP addresses at rates to be mutually agreed upon by the Operator and the County, not to exceed the Operator's standard rates for such IP addresses and related Internet services.

In addition, Section 14(g)(5) of the Franchise Agreement shall be amended as follows:

(5) For failure to make PEG capacity available; failure to provide Internet and ~~T-4~~ T-3 connections to the County; failure to comply with the provisions of Section 7(b)(3) regarding services to the Participating Municipalities; failure to provide any public service network that may be agreed upon by the parties; failure to construct required links to PEG facilities; or failure to make grant payments required under this Agreement: \$1,000/day for each day the violation continues, in addition to any monetary payment due under this Agreement or the Cable Law;

Starpower will provide these circuits throughout the period that Starpower does business in the County or throughout the remaining term of the Franchise, whichever is longer.

SECTION 2. RELEASE OF CLAIMS AND NO EFFECT ON FUTURE FRANCHISE REQUIREMENTS

2.1 The County hereby releases Starpower from any and all claims arising from Starpower's failure to build the Cable System to all areas of the Franchise Area as originally defined in the Franchise Agreement as adopted May 3, 1999. Nothing in this Settlement Agreement amends or alters the Franchise or any requirements therein or the County Cable Law in any way, and all provisions of the Franchise as amended herein or hereafter renewed or amended, and the County Cable Law remain in full force and effect and are enforceable in accordance with their terms and with applicable law.

2.2 Each party to this Settlement Agreement, after consultation with its legal counsel as to the facts surrounding this Settlement Agreement, concludes and agrees that no consideration provided pursuant to this Settlement Agreement can be construed to constitute a franchise fee, nor are any payments made under the terms of this Settlement Agreement subject to any limitations on franchise fees under applicable law or in the Franchise. The parties also agree that none of the costs arising out of this settlement constitute franchise-related costs. Every party to this Settlement Agreement hereby waives any current or future claim to the contrary.

SECTION 3. BREACHES

3.1 Any breach of this Settlement Agreement shall be deemed a breach of the Franchise and shall be subject to all remedies available for a breach of the Franchise, in addition to any other remedies the parties may have under this Settlement Agreement at law or equity.

SECTION 4. MISCELLANEOUS PROVISIONS

4.1 Authority. Each signatory to this Settlement Agreement represents that he or she has the authority to enter into this Settlement Agreement.

4.2 Voluntary Agreement. This Settlement Agreement is freely and voluntarily given by all of the parties, without any duress or coercion, and after each party has consulted with its counsel. Each party has carefully and completely read all of the terms and provisions of this Settlement Agreement. Each party acknowledges that this is a full, complete and final mutual release as set forth previously herein.

4.3 Successors and Assigns. This Settlement Agreement shall be binding upon, and shall inure to the benefit of, the parties hereto and their successors in interest, assigns, personal representatives and heirs.

4.4 Counterparts. This Settlement Agreement may be executed in several counterparts, each of which when so executed shall be deemed to be an original copy, and all of which together shall constitute one agreement binding on all parties hereto, notwithstanding that all parties shall not have signed the same counterpart.

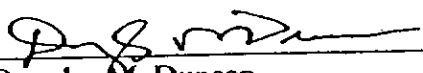
4.5 Headings. The headings in this Settlement Agreement are for convenience of reference only and are not a material part of this Settlement Agreement. They shall not be used in determining the intent of the parties.

4.6 Governing Law. This Settlement Agreement shall be governed by and construed, and the legal relations between the parties determined, in accordance with the laws of the State of Maryland.

4.7 **Consent to Jurisdiction.** Starpower consents to venue and jurisdiction in the U.S. District Court for the District of Maryland and the Circuit Court for Montgomery County, Maryland.

IN WITNESS WHEREOF, this Settlement Agreement is executed by the parties as follows:

MONTGOMERY COUNTY, MARYLAND

By 
Douglas M. Duncan
County Executive


9-10-03
Date

STARPOWER COMMUNICATIONS, LLC

By 

3-19-03
Date

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APPROVED AS TO FORM AND LEGALITY
OFFICE OF COUNTY ATTORNEY
BY 
DATE 4/9/03



MONTGOMERY COUNTY SERVICE AREA



MAP NOT TO SCALE

